IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No 4 of 2003
in
COMPANY APPLICATION No 305 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE R.S.GARG
and
HON'BLE MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BABUBHAI CHIMANBHAI SHAH

Versus

O.L.OF GITA FABRICS PVT.LTD.

Appearance:
1. O.J.APPEAL No. 4 of 2003
PARTY-IN-PERSON for Appellant No.
OFFICIAL LIQUIDATOR for Respondent No. 1
DELETED for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE R.S.GARG
and
HON'BLE MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 29/04/2005

ORAL JUDGEMENT (Per : HON'BLE MR.JUSTICE R.S.GARG)

Heard the appellant in person. The Official Liquidator is also in attendance. The present appeal has been filed by the appellant, Babubhai Chimanbhai Shah being aggrieved by order dated 29.10.2002 passed in Company Application No.305 of 2002 in Company Petition No.5 of 1988, whereunder, the application filed by the present appellant for correcting the number of Recovery Application from 746 of 1992 to 734 of 1992 has been rejected. For proper appreciation of the facts it is to be noted that the present appellant was appointed with the company under liquidation in the year 1980 and he continued upto 10.01.1983, after his termination without any inquiry he made Reference Application No.228 of 1983 seeking reinstatement with full back wages and other benefits which were permissible under law. His Application No.228 of 1983 was allowed ex parte by the learned Labour Court (Court No.14), Ahmedabad by award dated 07.03.1991. In spite of the award made by the learned Labour Court the respondent company did not reinstate the appellant nor did pay dues in accordance with law. Therefore, he filed Recovery Application No.734 of 1992. During pendency of Recovery Application No.734 of 1992 liquidation order of the respondent company was made by this Court on 28.10.1992, the said order was produced before the Labour Court and a prayer was made that the recovery application be rejected in accordance with section 446 of the Companies Act. The applicant apprehending rejection of the Recovery Application came to this Court in Company Application No.251 of 1993 and made a submission that he be allowed to proceed with his recovery application. After hearing the parties the Court granted permission in favour of the present appellant by order dated 29.04.1993. The matter continued to remain pending before the Labour Court in Recovery Application. During pendency of the application it was detected by the parties that the order dated 29.04.1993 passed by this Court mentioned that the present appellant would be entitled to proceed with his recovery application No.746 of 1992. The appellant, therefore, preferred Misc. Civil Application No.102 of 2002 submitting inter alia, that the order dated 29.04.1993 be modified by incorporating Recovery Application No.734 of 1992. The application was forced to be withdrawn because there were no incorrect mention in the order and the first application being Company Application No.251 of 1993 in fact referred to Recovery Application No.746 of 1990. Misc. Civil Application No.102 of 2002 was accordingly withdrawn. Thereafter, Company Application No.305 of 2002 was filed seeking

relief that the appellant be allowed to continue with his Recovery Application No.734 of 1992. The learned Single Judge observed that it would not be possible for this Court to grant a fresh leave almost after nine years of the first order. The learned Single Judge also looked into the award made in favour of the present appellant and observed that the Labour Court should not have proceeded ex parte and on merits of the matter an award could not be made in favour of the appellant, on the ground of delay and taking the said award not to be in accordance with law, it refused leave.

It is submitted on behalf of the appellant that the present is not a case where application is filed after 9 years or 12 years. The application was filed in the year 1993. At that point of time nobody observed that there was any delay. The submission further is that the application for correction especially of an inadvertent wrong mention can be made at any point of time and question of limitation cannot be raised. The submission further is that if leave is granted once then the question of grant of leave does not arise.

The Official Liquidator has filed his report and has submitted that there are secured creditors and the said leave could not be granted after lapse of nine years and the learned Company Judge is absolutely justified in not granting the application.

It is to be noted that Civil Application No.251 of 1993 was filed without any undue delay, The application was allowed. Leave was granted and permission was also accorded in favour of the present appellant to join the Official Liquidator as party to the said proceedings. We pose a question to ourselves that what would have been the legal position if the case number was shown as 734 of 1992 instead of 746 of 1992 and the answer to the question is that Recovery Application No.734 of 1992 could be continued for purposes of recovery. A wrong mention in the application which was carried to the order would not change the discretion already exercised by the Court. The Court after taking everything in juxtaposition has recorded its opinion that the present appellant would be entitled to proceed with his recovery application. The present was a case where the wrong was detected almost after nine years and an application was immediately made for correction and finding that Misc. Civil Application No.102 of 2002 could not be allowed a fresh application was submitted. Fresh application ordinarily ought to have been taken to be an application in continuation of the first

application or for making further order in furtherance of the first order dated 29.04.1993. The learned Single Judge has made a capital out of the wrong mention of the number. At this stage we would observe that to err is human. Error can be committed by any one. The learned Single Judge himself has referred to Recovery Application as Recovery Application No.734 of 1992 and in the very same para has referred the same as Company Application No.734 of 1992. A typographical error by typist or stenographer or an inadvertent mistake would not lead to a capital punishment of withdrawing earlier order. The basic question to be considered in a matter like this is whether the first application was filed with a mala fide intention and ulterior motive and the second application has been filed to obtain certain fresh reliefs or an inadvertent mistake was made in the first application which was carried into the order and whether the second application is for seeking correction in the order or seeking further reliefs. In the present matter the appellant certainly was entitled to a relief in his favour. At this stage we would also observe that neither the company nor the Official Liquidator, i.e. the care taker of the company has chosen to challenge the award made by the Labour Court or validity of the recovery application, therefore, the learned Company Judge ought not have looked into the validity, correctness or propriety of the award. The award had become final between the company and the employee and so long as the award stands right to recover money flowing from the award would always be in favour of the employee.

As on the earlier occasion leave was granted in favour of the appellant-applicant, we allow the application and grant same relief in favour of the present appellant. The appellant would be entitled to proceed with his Recovery Application No.734 of 1992 and would also be entitled to join Official Liquidator as a party-non applicant/ respondent in the said Company Application. The Appeal is allowed. No costs.

(R.S. Garg, J.)

(Ravi R. Tripathi, J.)

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